

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

**MICHELL NORTH, LLC, A MCDONALD'S
FRANCHISEE, AND MCDONALD'S USA, LLC, JOINT
EMPLOYERS**

Case 03-CA-148587

and

CITIZEN ACTION OF NEW YORK

**MCDONALD'S USA, LLC'S MOTION FOR A BILL OF PARTICULARS OR,
IN THE ALTERNATIVE, TO STRIKE THE JOINT EMPLOYER ALLEGATION
AND DISMISS THE COMPLAINT**

Pursuant to Section 102.24 of the National Labor Relations Board's ("NLRB" or the "Board") Rules and Regulations, Respondent McDonald's USA, LLC ("McDonald's"), by and through its undersigned counsel, hereby moves for an order requiring the Regional Director of Region 3 to specify with particularity in the Complaint the factual basis upon which he relies in alleging that McDonald's is a joint employer with its independent franchisee, Michell North, LLC, d/b/a McDonald's, located at 1814 Central Avenue, Albany, New York ("Michell"). In a case with far-reaching consequences for McDonald's, its independent franchisees, as well as other franchise businesses throughout the country, and where the General Counsel apparently seeks to change the Board's established legal standard for determining joint employer status under the National Labor Relations Act ("NLRA" or the "Act"), the Complaint contains only three vague, conclusory allegations regarding the purported joint employer relationship between Michell and McDonald's. Specifically, the Complaint alleges only: (1) the existence of a franchise agreement between McDonald's and Michell (2) that McDonald's "possessed and exercised control over the labor relations policy" of Michell at its McDonald's brand franchise

restaurant located at 1814 Central Avenue, Albany, New York (the “Franchisee Restaurant”); and (3) a legal conclusion that McDonald’s is a joint employer with Michell of its employees working at the Franchisee Restaurant. *See* Complaint ¶ IV. The Regional Director’s bare-bones, conclusory allegations provide insufficient notice to McDonald’s of the factual and legal bases for the alleged joint employer status, depriving McDonald’s of its fundamental right to due process under the Fifth Amendment to the U.S. Constitution. In order for McDonald’s to have a full and fair opportunity to answer the Complaint and prepare for its defense at trial, the Regional Director must first specify with particularity the underlying factual basis as to the joint employer allegation in the Complaint.

If the Regional Director does not describe with particularity the basis or bases for the joint employer allegation in the Complaint (*see*, Complaint ¶ IV) as mandated by the Administrative Procedure Act, Section 102.15 of the Board’s Rules and Regulations, Paragraph 10266 of the Board’s Casehandling Manual, and Section 300.3 of the NLRB Pleadings Manual-Complaint Forms, then McDonald’s moves that such paragraph be stricken and the Complaint against McDonald’s be dismissed for failure to state a claim.

THE JOINT EMPLOYER ALLEGATION

To satisfy due process, the Regional Director is obligated “to clearly define the issues and advise an employer charged with a violation . . . of the specific complaint he must meet . . . [and the failure to do so] is . . . to deny procedural due process of law.” *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981); *see also*, *SFTC, LLC d/b/a Santa Fe Tortilla Company*, 360 NLRB. No. 130 at 2 n. 9 & 10 n. 6 (June 13, 2014) (affirming dismissal of allegations where the Administrative Law Judge (“ALJ”) explained that: “[Respondent] is entitled to due process. That

is, it is entitled to know ahead of time what alleged violations it must defend. It is, after all, a simple matter to prepare or amend a complaint that does so.”)

The Administrative Procedure Act, the Board’s Rules and Regulations, and the Board’s Casehandling Manual demand that the Complaint notify a respondent of the facts and law at issue so the respondent has a full and fair opportunity to prepare a defense. *See*, Administrative Procedure Act, 5 U.S.C. § 554(b)(3) (“Persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of ***fact and law*** asserted”); NLRB Rules and Regulations, Rule 102.15 (“The complaint shall contain . . . a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent’s agents or other representatives by whom committed”); NLRB Casehandling Manual § 10268.1 (The Complaint “sets forth . . . the facts relating to the alleged violations by the respondent(s)”). Moreover, the NLRB Pleadings Manual- Complaint Forms also encourages descriptive pleading for joint employer allegations. *See*, NLRB Pleadings Manual § 300.3(b) (suggesting drafter of a complaint containing a joint employer allegation should “[i]nset [a] description of [the] business venture. For example, Employer A utilizes the referral services of Employer B when hiring employees for its facility located at ____.”)

“The test for joint-employer status is whether two entities ‘share or codetermine those matters governing the essential terms and conditions of employment.’” *See Flagstaff Med. Ctr., Inc.*, 357 NLRB No. 65, 2011 WL 4498271, at *11 (Aug. 26, 2011) (quoting *Laerco Transportation*, 269 NLRB 324, 325 (1984)). The mere existence of a franchise agreement does not weigh in favor of a finding of joint employer status. Nor does the Complaint point to any provision of the franchise agreement that does so. Finally, the Complaint does not identify with

any particularity how McDonald's allegedly possesses and/or exercises control over the labor relations policies of Michell, and/or administers common labor policies with Michell, at the Franchisee Restaurant, much less identify the labor relations policies at issue.

It is no secret that the General Counsel intends to pursue a more expansive theory of joint employer against McDonald's and its independent franchisees than the Board has previously adopted in any other context. However, here, the Complaint contains only a conclusory joint employer allegation that fails to satisfy the requirements that have either been traditionally applied or those applied in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (August 27, 2015).¹ Paragraph IV of the Complaint refers to the existence of a franchise agreement between McDonald's and Michell, and then goes on to allege generally that McDonald's somehow "possessed" and "exercised control over" unspecified "labor relations policy" of Michell, followed by the legal conclusion that McDonald's and Michell have therefore "been joint employers of the employees" at the Franchisee Restaurant operated by Michell. Even in *Browning-Ferris* the Board required that, as an initial matter, a common-law employment relationship must exist between the putative joint employer and the employees. *Id.* at 2. Moreover, where such common-law employment relationship is found to exist, the Board will then limit the scope of any recognizable joint employer relationship under the Act to those essential terms and conditions of the employees' employment over which the putative joint employer possesses sufficient authority to control so as to permit meaningful collective bargaining. *Id.* at 2, 16.

¹ Moreover, McDonald's hereby preserves its position that the new standard articulated in *Browning-Ferris* is ambiguous, impermissibly vague, and improperly ignores decades of precedent. Any attempt to impose a new, broader joint employer standard on McDonald's is improper and should be dismissed.

Here, the General Counsel does not in first instance even allege that McDonald's is a common-law employer of Michell's employees at the Franchisee Restaurant, let alone that McDonald's possesses sufficient authority to control specific essential terms and conditions of their employment to permit meaningful bargaining as a joint employer. Nor does the General Counsel attempt in the Complaint to tie any purported (albeit unspecified) control by McDonald's "over the labor relations policy" of Michell to the unfair labor practices alleged in the Complaint, even though the Board observed in *Browning-Ferris* that the extent of such authority to control marks the limits of any recognizable joint employment relationship under the Act. *Id.* As such, the bare-bones, conclusory allegations contained in Paragraph IV of the Complaint are plainly insufficient under the applicable legal standard(s) for determining that a joint employer relationship exists and/or its scope. Even more glaring, the allegations are seemingly unrelated, as there is no explanation as to any correlation between the franchise agreement and Michell's labor relations policies, let alone McDonald's alleged control over them.

These paltry allegations do not provide McDonald's with notice of the charges against it, nor do they identify a particular standard of conduct that McDonald's allegedly engaged in to make it a purported joint employer with Michell. Accordingly, McDonald's cannot answer the Complaint or fairly prepare for its own defense at trial. Thus, the Regional Director should be ordered to provide the particulars of the joint employer allegation, which is the sole basis for naming McDonald's as a Respondent in the Complaint. Alternatively, should the Regional Director fail or be unable to provide such particulars, then Paragraph IV of the Complaint should be stricken and the Complaint dismissed as to McDonald's.

WHEREFORE, having demonstrated that Paragraph IV of the Complaint is insufficient under the Fifth Amendment to the U.S. Constitution, the Administrative Procedure Act, the Board's Rules and Regulations, the Board's Casehandling Manual, and the Board's Pleading Manual-Complaint Forms by virtue failing to specify the factual basis for the joint employer allegation against McDonald's and Michell, McDonald's requests that:

(1) the Regional Director be ordered to promptly provide the specifics and particulars of the joint employer allegation contained in Paragraph IV of the Complaint; and

(2) upon the Regional Director's failure or inability to provide such specific and particular information to support the allegations in Paragraph IV of the Complaint, those allegations should be stricken and the Complaint dismissed as to McDonald's.

Dated: January 11, 2016.

Respectfully submitted,

s/ Willis Goldsmith

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CERTIFICATE OF SERVICE

The undersigned, an attorney, affirms under penalty of perjury that on January 11, 2016, he caused a true and correct copy of McDonald's USA, LLC's Motion for a Bill of Particulars or, in the Alternative, to Strike the Joint Employer Allegation and Dismiss the Complaint, to be served upon counsel for the parties by email (where indicated), and otherwise by first-class mail in a postage-prepaid envelope to the corresponding address below:

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